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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 548

HARRY RENTON BRIDGES, HENRY SCHMIDT, and J. R. ROBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I

THE STATUTE OF LIMITATIONS

A. The Wartime Suspension Act.

The Government's entire brief on this point is bottomed on the erroneous and repeatedly rejected premise that because the indictment alleges *falsehoods*, it thereby charges *crimes of which fraud is a statutory element* within the ambit of the 1942 Wartime Suspension of Limitations Act. Apparently, the Government has absorbed nothing from *United States* v. *Noveck*, 271 U. S. 201, *United States* v. *McElvain*, 272 U. S. 633, *United States* v. *Scharton*, 285 U. S. 518 and *Braverman* v. *United States*, 317 U. S. 49, except a desperate itch to ignore them (as *Braverman*, not even cited in the Government's brief), reject them as er-

roneous (as *McElvain*, Gov. Br. 47-48), or attempt impossible distinctions (as *Novick*, Gov. Br. 36-37).

Most significantly, our discussion (Pet. Br. 23-24, 27-29) of the consequences of re-enactment of the statutory language after, and with express Congressional awareness of, these decisions of this Court, is nowhere alluded to in the Government's brief, for the obvious reason that the Government is unable to formulate any effective reply.

We are obliged to reiterate that the Suspension Act is inapplicable to this indictment for two distinct and wholly *independent* reasons. First, because fraud is not an element of the crimes charged, within the rule laid down by this Court in the cases cited above. Second, because, even if fraud were such an element here, the indictment would still meet neither the requirement of "pecuniary" fraud specified in *Marzani* v. *United States*, 168 F. 2d 133 (D. C. Cir.), nor of fraud arising out of the war, as described in *United States* v. *Gottfried*, 165 F. 2d 360 (2d Cir.). We stress the separate and independent character of these requirements, neither of which this indictment meets, because the Government's brief at various points confusingly and erroneously implies or assumes that they are interdependent.[1]

Count II. As anticipated, the Government has indefatigably restated the argument, consistently rejected by this Court (Pet. Br. 41), that fraud must be regarded as

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[1] See, *e.g.*, page 35 of the Government's brief: "Petitioners assert that the type of fraud here involved, if it is fraud, is fraud in a secondary sense as that description was used in *United States* v. *Colm*, 270 U. S. 339 (Pet. Br. 36)". This quotation occurs in the portion of the Government's brief dealing with fraud as an essential element of the crime charged, whereas our reference to the *Colm case* (Pet. Br. 29-30, 36) is solely in connection with the separate and independent requirement that the fraud be pecuniary or connected with the war.

an element of the offense charged in Count II because it is the purpose or consequence of the alleged false statement. Thus the Government declares: "To lie knowingly in a naturalization proceeding is to attempt to deceive the United States with respect to the grant of a very valuable right, namely, citizenship. . . . To attempt to gain such a benefit by deception clearly falls within the conventional notion of fraud" (Gov. Br. 30; see also 33).[2]

But on this reasoning, a falsehood told to deprive the Government of taxes justly due would equally be a fraud within the Suspension Act, whereas the *Noveck* and *Scharton* decisions held to the contrary. That the falsehoods there charged had a fraudulent purpose was deemed irrelevant, because the statutory crimes charged (perjury in *Noveck*, false income tax returns in *Scharton*) were punishable *irrespective* of the presence or absence of fraudulent purpose. Therefore, fraud was not an element of the crime, and neither the wording nor the purpose of the Suspension Act applied (Pet. Br. 20-26).

The very portion of the *Noveck* opinion (271 U. S. at 203) quoted by the Government (Gov. Br. 37) gives the key: ". . . the alleged purpose to defraud the United States is not an element of the crime defined in § 125, on which the indictment is based. That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage". So here "the alleged purpose to defraud" is not an element of the crime defined in Count II; an allegation of fraud would not affect the charge—indeed, Count

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[2]The Government here cites *Schwinn* v. *United States*, 112 F. 2d 74 (9th Cir.), but omits to note that this Court, in affirming that decision *per curiam*, 311 U. S. 616, carefully refrained from approving the lower court's reasoning that the false statement there involved was fraudulent (Pet. Br. 38, footnote 34).

II does not in fact charge fraud (Tr. 6-7); such an allegation did not have to be—and in fact was not—proved; and it would have been surplusage.

No wonder the Government, albeit shyly, invites this Court (Gov. Br. 31, footnote 12) to overrule the *Noveck* case.[3] No wonder, in seeking to discredit the concededly square holding in *United States* v. *Obermeier*, 186 F. 2d 243 (2d Cir.) that the Suspension Act does not apply to Count II (Gov. Br. 36), the Government attempts an utterly artificial limitation of the *Noveck* decision, unsupportable in the light of the subsequent *Scharton* case.[4]

The Government has endeavored (Gov. Br. 34) to draw from *Knauer* v. *United States*, 328 U. S. 654 an atmospheric inference that all false statements in naturalization proceedings are fraudulent. The effort is not only futile,[5] but in plain conflict with the contemporaneous and subsequent content of the naturalization laws. Thus the statutory provisions upon which Count III is based carefuly distinguished

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[3]The dangerous consequences of this suggestion, set forth in our brief (pp. 42-48), are not dealt with in the Government's brief.

[4]At p. 37 of its brief, the Government states: "Thus the [*Noveck*] case may well stand for the proposition that the United States is not, under Section 125, necessarily the defrauded party since the statute governs perjury generally and perjury occurs in suits not involving the United States". But the interpretation thus suggested is itself destroyed by the *Scharton* case, wherein the falsehood was charged under the Revenue Laws, and the United States was therefore "necessarily the defrauded party" under the statute upon which the indictment was based.

[5]The *Knauer* case involved not a false statement of past fact, but the *bona fides* of the oath of allegiance (Pet. Br. 74-75). More important, the question there (which did not touch the Suspension Act) was whether the *particular statement* had a fraudulent purpose. This has nothing to do with the question whether the statute on which Count II is based requires intent to defraud as an essential element of the offense of making a false statement. As has been shown (Pet. Br. 34-37) it does not; it covers all false statements in naturalization proceedings regardless of the presence or absence of fraudulent intent.

(Pet. Br. 38; Appendix 2) between naturalization "procured by fraud" and "procured by the use or means of any false name or false statement".

So, too, the Act of June 27, 1952, 66 Stat. 166, 8 U. S. C. 1101, *et seq.* (the McCarran-Walter Act) changed the statutory "basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by wilful misrepresentation" (Sen. Rep. No. 1137, 82nd Cong., 2nd Sess., p. 45). This change was made on the basis of a previous report by the Senate Committee on the Judiciary which concluded (Sen. Rep. No. 1515, 81st Cong., 2nd Sess., p. 769): ". . . that this language will clear up the conflicts that have arisen in cases involving revocation because of fraud or illegality, and that 'concealment of a material fact or . . . wilful misrepresentation' is more easily proved than is an allegation of fraud or illegality."

Thus, both at the time the offenses here were alleged to be committed, and subsequently, the statutory language and legislative history demolish the Government's contention that all falsehoods in naturalization proceedings are fraudulent. For this reason and the others set forth in our brief (pp. 19-48), the *Obermeier* case is right, the decision below is wrong, and Count II is clearly barred by the statute of limitations.

Count I. The Government's brief (pp. 44-50) is a labored effort to bring Count I within the Suspension Act even though Count II is barred. Of course, Count I is cast in the language of conspiracy to defraud (Tr. 2-6), but it charges nothing but the allegedly false statement by Bridges which is the subject of Count II, plus the usual allegations

of conspiracy "with each other" and overt acts (the formal steps in the naturalization proceeding) to ground a conspiracy count.

The Government admits (Gov. Br. 46) that petitioners could have been charged with conspiracy to commit an offense (to wit, the false statement) instead of conspiracy to defraud, in which event, concededly, the applicability of the Suspension Act to Count I would depend on its application to Count II. But the Government cannot show that Count I in fact charges anything more than a conspiracy to commit this offense. The "defrauding" language is simply wrapped around the charge of conspiracy to commit an offense, and adds nothing; it merely lays bare the Government's design to pull Count I into the Suspension Act by using "fraud words" which are surplusage.[6]

Wriggle as they may, the Government cannot escape the conclusion that if fraud is not an element of the offense charged in Count II, it cannot be an element of the conspiracy charged in Count I. Indeed, in an unguarded passage of their memorandum on certiorari (p. 7) in the companion case (*Bridges* v. *United States*, pending, No. 549), the Government categorically declares: ". . . the illegality of the conspiracy is predicated on a contravention of the statutory mandate of the Nationality Act."

As for the authorities, the Government complains (Gov. Br. 47): "The principal difficulty with briefing this part of the case is that the answer seems so obvious." But we need not commiserate with the Government, for it imme-

[6] The Government's feeble efforts (Gov. Br. 46) to claim that in Count I "The conspiracy to defraud was thus broader in terms than a mere conspiracy to make a false statement" is unsupported and illogical. Of course, Count I is broader than Count II because the elements of conspiracy (agreement and overt act) are added, but Count I requires only proof of conspiracy to make the false statement.

diately appears that they arrive at the "obvious" answer only by asking this Court (Gov. Br. 48) to reject *United States* v. *McElvain*, 272 U. S. 633,[7] and by totally ignoring *Braverman* v. *United States*, 317 U. S. 49, and our entire argument based on legislative history and Congressional re-enactment (Pet. Br. 27-29).

Count III. Here we have nothing to add to our brief[8] (pp. 38-39) other than to note that, once again, the Government (Gov. Br. 50-52) is clinging to the presence in the statute of the word "fraud", and overlooks that the Suspension Act requires not the mere word but that the offense embrace fraud as an essential element. Count III is cast in the language of fraud, but all that it in fact charges is that the petitioners Robertson and Schmidt assisted Bridges to obtain naturalization by means of allegedly false statement.

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[7]The Government declares (Gov. Br. 48) that the opinion in the *McElvain* case "seems to assume, contrary to the fact, that the indictment was for a conspiracy to commit an offense rather than conspiracy to defraud." But this Court was under no such misapprehension in the *McElvain* case. The very first sentence of Mr. Justice Butler's opinion (272 U. S. at 636) declares that the indictment there in question was "for conspiracy to defraud the United States in respect of its internal revenues."

[8]As we pointed out in our brief, the statute on which Count III is based (8 U. S. C. 746 (a)(5)) includes both clause a, covering certificates procured by fraud, and clause b, covering certificates procured by means of a false statement. Here, as in Count I, the Government has utilized the statutory language of the fraud clause, while alleging facts which would support only an indictment under the false statement clause. Therefore, the crime of "assisting" charged in Count III is no more within the Suspension Act than is Count II. *Cf. United States* v. *Tommasello*, 169 F. 2d 348, 350-51 (2d Cir.).

The effort to ascribe independent false statements to Schmidt and Robertson (Gov. Br. 51) is not only directly contrary to the entire theory upon which the case was tried below (cf. *De Jonge* v. *Oregon*, 299 U. S. 353; *Cole* v. *Arkansas*, 333 U. S. 196), but is inconsistent with the Government's admission that it is Bridges' answers "which form the basis for this prosecution" (Gov. Br. 86).

B. The Five-Year Period of Limitations Does Not Apply to the Offenses Charged in Counts II and III.

In our brief we urged that as a result of the legislative history surrounding the 1948 revision of the Criminal Code, of well recognized principles with respect to repealers and savings clauses, and of well-established Congressional legislative practice, the five-year statute of limitations formerly contained in Section 746(g) of Title 8 cannot be deemed to be "saved" by Section 21 of the 1948 recodification of the Criminal Code. That was both the conclusion and reasoning of the Second Circuit in *United States* v. *Obermeier*, 186 F. 2d 243 and of the court below (199 F. 2d 811, 819-820).

Despite its recognition that prior revisions have contained savings clauses which "in express language" saved periods of limitations, the Government contends that the marked departure from this legislative practice in Section 21 was "merely a change in style of draftsmanship" and should not be accorded the obvious weight which attaches to it. (Gov. Br. 54-57).

The Government has also emphasized the practical importance of a statute of limitations upon the exercise of a right or liability and has urged that even in the absence of express language dealing with limitations, a savings clause preserving "rights and liabilities" must be deemed to include it.[9]

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[9]It is, of course, almost universally recognized that statutes of limitations are to be classified as "procedural". "It is established in English and Scotch law that the Statute of Limitations is procedural. The same may be said in general of American Statutes of Limitation." 4 *Harvard Studies in the Conflict of Laws*, 248 (1940). See also

1. The language of Section 21 reflects much more than a change in style.

The suggestion that styles in draftsmanship have changed radically in recent years is hardly borne out by even a hasty examination of recent savings clauses. Just last year, for example, in the McCarran-Walter Act (Act of June 27, 1952, c. 477, Sec. 405, 66 Stat. 166), the Congress was most careful to specify that

> "Nothing contained in this Act . . . . shall be construed . . . . to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation or matter, civil or criminal, done or existing at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided herein, hereby continued in force and effect."[10]

British Linen Co. v. *Drummond*, 10 B. & C. 903 (K. B. 1830); *Don* v. *Lipmann*, 5 Cl. & F. 1 (H. L. 1837).

Indeed, the Government has conceded (Gov. Br. 52) that "an individual has no vested right in any specific statute of limitations . . .".

[10]See also Joint Resolution, November 4, 1939, Section 19, 54 Stat. 4, ("offenses . . . may be prosecuted and punished, and suits and procedures . . . may be commenced and prosecuted in the same manner and with the same effect as if such joint resolutions had not been repealed"); Act of August 13, 1946, c. 959, section 25, 60 Stat. 1049, ("existing provisions of law authorizing suits . . . and governing the conduct or determination of such suits shall continue to apply to any case heretofore or hereafter instituted hereunder . . ."); Act of August 10, 1949, c. 412, section 12 (g), 63 Stat. 579, ("shall . . . have the same effect as if this Act had not been enacted").

Even in the recent codifications, Congress evidently did not believe that the new "style" of saving just rights and liabilities was adequate; for when it wished to be certain of saving "procedural matters" it did so explicitly.[11]

The limited language used in Section 21 cannot be explained on stylistic grounds. It obviously reflects a conscious and knowing use of restricted language by the Congress to which effect must be given by this Court.

2. The effect of a savings clause preserving "rights and liabilities".

The Government urges that since limitations have an important impact upon the exercise of rights or liabilities, the period of limitations must be preserved under a statute saving rights and liabilities. *De La Rama Steamship Co.*

The Act of June 25, 1948, c. 648, 62 Stat. 1014, passed on the same day as Section 21, provided in Section 4 that "Nothing contained herein shall be construed to prevent the prosecution, punishment, mitigation, or other action, . . . as to any offense made punishable by the Articles of War committed prior to the date of this Act by any person subject to military law . . ."

[11] In the statutes codifying Titles 3 and 14 there appear, not only the provisions saving rights and liabilities, but a specific sections as follows:

> "The provisions of title 3, 'The President', set out in section 1 of this Act, shall be construed as a continuation of existing law and no loss of rights, interruption of jurisdiction, nor prejudice to matters pending on the effective date of this Act shall result from its enactment" (Act of June 25, 1948, c. 644, Section 2, 62 Stat. 672).
>
> "All orders, rules, and regulations of the Coast Guard in effect under provisions of law superseded or amended by this Act shall, to the extent they would have been authorized under this Act, remain in force and effect as the regulations and orders under the provisions of this Act and shall be administered and enforced under this Act as nearly as may be until specifically repealed, amended, or revised" (Act of August 4, 1949, c. 393, Section 4, 63 Stat. 495).

v. *United States*, 334 U. S. 386, upon which reliance is placed in this connection, does not support such a proposition.[12]

Apart from the distinctions between the case at bar and *De La Rama* to which we have already adverted,[13] there are other compelling factors which demonstrate that that case is inapposite.

Initially, it must be noted that the applicable savings clause in *De La Rama*, in addition to preserving the repealed rights and liabilities under the War Risk Insurance Act, provided that "such statute shall be treated as remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . . . liability."

The Court was not unaware of the fact that matters of "procedure" have direct and substantial effects upon "rights and liabilities", but it did not rest its decision on that basis. Rather, the Court relied upon the specific language of the savings clause above quoted and observed that the case demonstrated the importance "of saving the statute and not merely the liability." *Id.* at 339.

Section 21, of course, purports to preserve only "rights and liabilities."

Secondly in the *De La Rama* case the entire statute upon which the proceeding was based and out of which all of

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[12] *United States* v. *Oppenheimer*, 242 U. S. 85, is also relied upon, but that case had nothing to do with a change in the period of limitations or with a savings clause.

[13] See Pet. Br. 51-52. Other cases relied upon by the Government can similarly be distinguished because the proceedings were *sub judice* at the time the law was changed or because a statute of limitations was in no way involved. *E.g.*, *Hiatt* v. *Hilliard*, 180 F. 2d 453 (5th Cir.); *Lovely* v. *United States*, 175 F. 2d 312 (4th Cir.); *United States* v. *Kirby*, 176 F. 2d 101 (2d Cir.); *Quirk* v. *United States*, 161 F. 2d 138 (8th Cir.).

the rights and liabilities arose was repealed. There was not, as in the instant case, a mere recodification of the law which in no way changed the substantive provisions of the earlier statute.[14]

The opinion of this Court just last year in *Bruner* v. *United States*, 343 U. S. 112, points up this distinction between the *De La Rama* case and the instant proceeding. While the *Bruner* case was in litigation Congress amended the applicable statute to revoke the jurisdiction of district courts with respect to the matter there involved. This court held the amendment to be immediately effective and to apply to pending cases. The general savings clause was held inapplicable because no substantive rights or liabilities had been changed by the new legislation.

Thus in both the *Bruner* and *De La Rama* cases the same question was presented, i.e. whether the jurisdiction of

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[14] In the *De La Rama* case the government reversed the position it had taken in the courts below and did not urge that the district court had lost jurisdiction as a result of the repeal of the War Risk Insurance Act. It was impressed by the fact that the repeal went both to substantative and procedural matters and was not simply a change in jurisdictional matters. It summarized this argument as follows:

> ". . . this Court has apparently drawn a distinction in general terms between substantative and jurisdictional provisions of repealed statutes, holding that the general savings statute applies to substantive rights.
>
> On the other hand, no decision of this Court holds that the general savings statute fails to preserve the jurisdictional provisions of a repealed statute where those provisions are an intrinsic part of the repealed statute and form an integral part of the machinery for enforcing the substantive liabilities preserved by the general savings statute. If such a distinction between statutes which are jurisdictional only and statutes which not only contain jurisdictional provisions but also create substantive liabilities should be held to be valid . . . it would follow that, in this case, the district court's jurisdiction was preserved." (Gov. Br. 5, 6.)

a district court, with respect to a pending case, survived a repeal of the statute conferring jurisdiction. In both cases the "dollars-and-cents importance" of the question was presumably the same. The *Bruner* case held that jurisdiction did not survive because no substantative right or liability had been altered. The *De La Rama* case reached the opposite conclusion not because "jurisdiction" was itself "substantive," but because rights had been altered and the savings clause was worded in such a manner as to preserve the procedures formerly available for the enforcement of those rights.

The 1948 codification of the Criminal Code, insofar as here relevant, was directed only to a change in the period of limitations. It did not eliminate the false statement provisions of section 746(a) of Title 8, but merely moved them to Title 18. It is thus clear that the instant case is more comparable to the *Bruner* decision.

3. Legislative history discloses an intent to make the new statute of limitations operative for all prosecutions commenced after its effective date.

If a period of limiations has not yet expired, Congress certainly may shorten or lengthen the period even with respect to causes of action already existing. Whether a change in the period of limitations applies to causes of action which have already arisen depends upon the language of the Act and Congressional intent. *Sohn* v. *Waterson*, 17 Wall. 596 (U. S., 1873).

In private litigation there is always present a constitutional question since a "retroactive" application of a statute of limitations may be a deprivation of property without due process of law. Thus in *Sohn*, the Court refused to follow the clear language of the act and apply the new pro-

visions retroactively because to do so would destroy the property rights there involved and would raise serious constitutional questions.

In the instant case there is no such reason for departing from the plain meaning of the statutes.[15]

In *United States* v. *Lindsay*, 202 F. 2d 239 (1st Cir.), decided just two months ago, Judges Magruder, Woodbury and Hartigan, made this distinction very clear. They applied a new statute of limitations to a civil cause of action already accrued in favor of the Government even though they thereby cut off its ability to proceed since Congress clearly could, without constitutional objection, cut off such a right completely.

Even apart from the unambiguous wording of the statutes here, it is clear that there was an intent to make the new period of limitations operative on the effective date of the codification for all prosecutions commenced thereafter.

It has already been pointed out (Pet. Br. 49, 50) that for at least the past seventy-five years, whenever Congress has sought to preserve the original period of limitations with respect to offenses already committed at the time of a change in the period, it has made express provision to that effect. The importance of this legislative pattern cannot be minimized. In *Bruner* v. *United States*, *supra*, the Court found an intent on the part of Congress to exclude pending cases from the district courts as a result of the fact that in 1898 in dealing with a similar problem Congress had specifically included pending cases whereas in 1951 a similar reservation was not made! In the instant

[15] Although it would have been clearly proper for Congress to cut off the right to prosecute completely, it carefully avoided such a result in this case (Pet. Br. 51).

case, Congress has specifically dealt with the applicability of a change in the period of limitations to outstanding causes of action on numerous occasions since 1874 and as recently as 1947. (Pet. Br. 49-50; Gov. Br. 54-56; 1 U. S. C. 110.) The reasoning of the *Bruner* case therefore becomes even more compelling.[16]

An intent to make the change from five years to three years is also implicit from the fact that the reviser noted that there was no reason for having a five year period with respect to naturalization crimes and a shorter period for more heinous ones. The presence of a cogent reason for a change in the period of limitations is also reason for applying the change to causes of action which have already accrued as well as to those arising in the future. Thus, the so-called McCarran-Walter Act, *supra,* enlarged the period of limitations with respect to naturalization and passport crimes from three years to ten years. Under its reasoning in this case, the government would continue to be bound by the three year period for all crimes committed before the effective date of that Act, despite the strong reasons advanced for the extension of that period. Whether or not that is the position of the government, it is the necessary result of their reasoning here.

4. The authorities relied upon by the Government in no way discredit the decision in *United States* v. *Obermeier* or of the court below.

Both the court below and the Second Circuit have carefully considered and unanimously rejected the position here taken by the government. In an effort to avoid this result the government has cited numerous opinions of this and

[16] *Supra,* pp. 9-10; 14.

other courts. It is submitted that none of them is here controlling.

In *United States* v. *Oppenheimer*, 242 U. S. 85, the Court merely rejected the contention of the government that if an accused has successfully urged a plea in bar he has never been in jeopardy. *Id.* at 87. A decision based on any number of purely procedural matters may clearly become *res judicata*—the statute of limitations is no exception.

In *United States Fidelity & Guaranty Co.* v. *United States for the use of Struthers Wells Co.*, 209 U. S. 306 the very structure of the original and amending statutes demonstrated that Congress intended all of the provisions to apply prospectively. Of course, a demonstrable congressional intent[17] is of extreme importance in determining whether the new provisions apply to existing causes of action.

United States v. *St. Louis, San Francisco & Texas Ry. Co.*, 270 U. S. 1, dealt with a civil claim wherein the period of limitations was reduced. No congressional intent with respect to its application could be found.[18] As already pointed out in *Sohn* v. *Waterson*, *supra*, to apply the statute retroactively could cut off some claims completely and would therefore have raised serious constitutional questions. Although the Court did not so state, it apparently refused to presume such an unconstitutional intent. The other alternatives were to apply it prospectively or to start the new period running on the date the new act became effective. Presumably unable to find any reasonable basis for taking

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[17] *Supra*, pp. 14-15.

[18] "There is nothing in the language of Paragraph 3 of Section 16, or in any other provision of the Act, or in its history, which requires us to hold that the three year limitation applies, under any circumstances, to causes of action existing at the date of the Act." (*Ibid.*, 270 U. S. 1, 3.)

this latter view (which was the construction urged by the government), the Court gave the statute a prospective application.

Hoiness v. *United States*, 335 U. S. 297, wherein the Court stated that the "policy" of a particular provision requiring courts to disregard niceties of form had been preserved upon the enactment of the Judicial Code, was not a criminal proceeding, did not involve the statute of limitations, and was in litigation long prior to the adoption of the Judicial Code.

The government's handling of *Great Northern Railway Co.* v. *United States*, 208 U. S. 452, is surprising. It has here described (Gov. Br. 64) *Great Northern* as not confining the general savings clause to substantive matters. Yet just a few months ago in its brief to this Court in *De La Rama*, it stated (pp. 12-13) "In *Great Northern Ry. Co.* v. *United States*, . . . the Court held that the general savings statute did not preserve the procedures and remedies of the Elkins Act of 1903 after that Act had been amended by the Hepburn Act of 1906." Although the position of the government may have changed in these months, the *Great Northern* case must still be given the interpretation placed on it by the Second Circuit in *Obermeier, supra*, and, indeed, by this Court in *Hertz* v. *Woodman*, 218 U. S. 205.

II

RES JUDICATA, ESTOPPEL AND DUE PROCESS

A. The Secretary of Labor's Decision

The Government concedes (Gov. Br. 78) that "The 1938 hearings did end in an administrative determination

that, on the evidence presented, Bridges had not been shown to be a member of the Communist Party as of that time." However, the Government contends that this finding is of no effect in the present proceeding for two reasons: first, that the effect of the Secretary of Labor's finding on the factual issue in the present proceeding (Gov. Br. 79) "is not properly before this Court on the present review"; and second, that the Secretary's determination, being administrative in character, should be given no weight as *res judicata* or by way of estoppel in a subsequent judicial proceeding.

The first of these points is utterly ephemeral. We have contended, with respect both to the Landis-Perkins and the Sears-Biddle determinations, that the issue of Bridges' Communist membership in the present proceeding should have been limited to the period of time since those determinations were made. The Government now argues that this point is not open on certiorari, because (Gov. Br. 79): "The issue raised in the petition was whether the prosecution was barred and that is one of the two issues to which the grant of certiorari was specifically limited by order of this Court." But in fact the question stated in our petition (Petition for Certiorari, p. 3) was whether this proceeding was barred *in whole or in part*. The italicized words, carefully omitted from the Government's statement of the issue (Gov. Br. 79), were included in the question for the specific purpose of challenging the legality of re-litigating the issue of Bridges' Communist membership prior to the time of the administrative determination.[19] There is not

[19]Our Petition (p. 12, footnote 14) and our Reply Memorandum (pp. 3-4) contained argument in support of our contention that the prior administrative determinations estopped the Government from re-litigating the question of Bridges' Communist membership prior to the administrative determinations.

the slightest warrant for the Government's contesting the reviewable status of this issue before this Court.

Turning to the Government's second contention, it appears that their denial that a decision in a deportation proceeding is ever *res judicata*, or grounds for estoppel, is based on: (a) the description of deportation proceedings as "political", citing *Harisiades* v. *Shaughnessey*, 342 U. S. 580, 589; (b) the Attorney-General's later refusal to treat the Secretary's decision as binding (Gov. Br. 81); (c) want of mutuality (Gov. Br. 85); and (d) the fact that deportation is an "executive" or "administrative" function.

Only[20] the last of these reasons warrants attention here. As we have shown (Pet. Br. 56-62), numerous types of quasi-judicial administrative proceedings have been accorded the attributes of *res judicata* in later judicial proceedings, and the deportation proceedings here fall clearly within the quasi-judicial category.

The Government cites *Wilbur* v. *United States ex rel Kvdric*, 281 U. S. 206, in an effort to support its statement that "the finding of an examiner in a deportation proceeding is '. . . not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the

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[20]The *Harisiades* case is in no way in point here, and the adjective "political" cannot properly mean much more than "executive" or "administrative". The Attorney-General's conclusion in *In re Harry Bridges before the Attorney-General in Deportation Proceedings* (May 28, 1942, p. 30) was not a departmental rule, and was summarily stated and based on an erroneous application of *Pearson* v. *Williams*, 202 U. S. 281. The argument of want of mutuality, long since discredited in the law of remedies (see Judge Cardozo's opinion in *Epstein* v. *Glucken*, 233 N. Y. 490; 135 N. E. 861), is frivolous indeed when the lack of mutuality is (as the Government here suggests) caused by a difference in the standard of proof as between civil and criminal proceedings. In any event, the point is quite settled by *United States* v. *Balt. & Ohio R. R. Co.*, 229 U. S. 244 (Pet. Br. 54, footnote 55).

exertion of administrative authority' " (Gov. Br. 83). But the wholly distinguishable *Wilbur* case not only has nothing to do with immigration or deportation proceedings; it rested upon an altered interpretation of law (not of fact) by the Solicitor of the Department of Interior, and upon the fact that the statute under which the Secretary's earlier determination was made did not make his prior determination "final" (see 281 U. S. at 217). Compare *United States* v. *Atkins*, 260 U. S. 220 and *United States* v. *Wildcat*, 244 U. S. 111 (Pet. Br. 61) where "final" orders involving Indian claims were held *res judicata*. Similarly, in the present case, the Secretary of Labor's determination in the deportation proceeding was "final" under the statute. *Heikkila* v. *Barber*, 345 U. S. 229.

B. *Bridges* v. *Wixon*.

We believe that the effect of *Bridges* v. *Wixon*, 326 U. S. 135, as an estoppel to relitigation of the issue of Bridges' Communist membership prior to 1941, is adequately covered in our brief (Pet. Br. 66-72). Nor, for the reasons stated above (pp. 18-19), is there any doubt that this question is properly before this Court for review.

We desire only to note with interest that the Government, after obstinately arguing (Gov. Br. 77) that the *Wixon* case cast no doubt on the sufficiency of "the evidence then available" to support a finding that Bridges was a Communist, promptly reverses itself and explains that Bridges' naturalization was not contested by the Government, only three months after the *Wixon* decision, because the hearing examiner had "ascertained that it had been determined that the Government did not have sufficient evidence at that time to show that Bridges was a member of

the Communist Party". (Gov. Br. 86, footnote 36; Tr. 529). The Government's entire contention thus becomes well-nigh preposterous. It is perfectly clear from this circumstance as well as from the Government's abandonment of the deportation proceeding (Pet. Br. 69-70), that the *Wixon* decision was treated, by the Government and by all others concerned, as a finding that the evidence available, whether in 1941 or 1945, was insufficient to support a determination that Bridges was a member of the Communist Party.

C. The Naturalization Decree.

On this point, the Government opens with the argument (Gov. Br. 85-86) that "the Government did not litigate the issue of Bridges' Communist membership in the naturalization proceedings", and that, therefore, there was no determination by the naturalization court of the factual issue of membership. It is true that the Government did not "litigate" the issue in the sense of opposing Bridges' naturalization.

But the reasons for this failure, as set forth in the Government's brief (at pages 86-87, footnotes 36-37) are truly remarkable. One is given the impression that the hearing examiner (Mr. Lloyd H. Garner) was somehow caught unawares and unsuspecting of the issue, and totally unprepared to come forward with any evidence bearing on the matter. One would never guess, to read this portion of the Government's brief, that the Government's investigative machinery had then been at work for over a decade, and that two protracted administrative hearings, as well as the litigation of *habeas corpus*, had preceded Bridges' application for citizenship. The reader is also led to believe that poor Mr. Garner was equipped only with "an affidavit

. . . by a former wife of Bridges, accusing him of being a Communist" which "had come into Garner's possession the morning of the hearing, and into the possession of the Department of Immigration and Naturalization the Friday before". Then, as the Government sadly observes, "aside from this document, Garner had no other evidence to present to the Court". What on earth had happened to the bushels of evidence previously accumulated and presented before Dean Landis and Judge Sears?

It is in this extraordinary context that one must assay the Government's contention (Gov. Br. 85, footnote 35) that it was not obliged to contest the membership issue in the naturalization proceeding, and was at liberty to preserve it for a later day in court. Whatever appeal this argument might have in a situation where the Government had been prevented, by lack of time or for other reasons, from making a full investigation of an applicant for naturalization, it is wholly unrealistic as applied to the actual situation now before this Court.

But the judicial finality of Bridges' naturalization decree does not, of course, rest on these particular circumstances, compelling as they are. For the Government's apparent conception of a naturalization proceeding, as determining only those issues which the Government actively contests, flies in the face of the purpose and structure of the naturalization laws, and is wholly lacking in judicial support. The Government's contention leads straight to the conclusion that *every* naturalization decree can be challenged, whether by revocation or collateral attack, on any issue except one which the Government has unsuccessfully contested in the naturalization proceeding itself. The far-reaching and unsound effects of such a result are manifest.

The law is clearly to the contrary. *Spratt* v. *Spratt*, 4 Pet. 393, 407-408 (U. S., 1831); *Tutun* v. *United States*, 270 U. S. 568, 577; *Bindczyck* v. *Finucane*, 342 U. S. 76, 80-81, 83-84.[21]

By no means do we mean to suggest that the extent to which a naturalization decree is *res judicata* is free from vexatious and unsettled questions. The Government's disposition (Gov. Br. 88) to regard our position as just too silly for serious consideration might be tempered by perusal of the Report of the Senate Committee on the Judiciary (Sen. Rep. No. 1515, 81st Cong., 2nd Sess., pp. 756-764), wherein it is stated (at p. 756) that the nature of the fraud which can be relied on as the basis for revocation and the scope of *res judicata* in naturalization proceedings are "the source of considerable confusion and conflict in the law."

These questions, and their pertinence to the present proceeding, cannot be settled by the generalities relied upon

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[21]The Government also contends that the naturalization decree did not determine the issue of membership because (Gov. Br. 87) "it is by no means clear that mere membership would have been considered by the court at that time as a bar to naturalization." Having said this, the Government is then obliged to scramble rapidly (Gov. Br. 88, footnote 38) to avoid the inference that the question and answer with respect to membership were not material, since such an inference would destroy the entire basis of the indictment here in question. But it is apparent from the proceedings before the California Superior Court (Tr. 133-145), that the naturalization court did regard the issue of Communist membership as one which had to be determined (Pet. Br. 8-9, 72). See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 593-594: "During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States government by force and violence, a category repeatedly held to include the Communist Party . . . It [Congress] regarded the fact that an alien defied our laws to join the Communist Party as an indication that he had developed little comprehension of the principles and practice of representative government or else was unwilling to abide by them."

by the Government (Gov. Br. 88-89). As we have pointed out (Pet. Br. 72-79), the Government's standing to challenge the naturalization decree is here fatally weakened because it proceeded by collateral attack, rather than by revocation proceedings. *Bindczyck* v. *Finucane*, 342 U. S. 76. Even in revocation proceedings the Government's position would be doubtful enough. This was the very question reserved in the *Knauer* case (328 U. S. at 670-671). See also *Chitwood* v. *United States*, 178 Fed. 442 (8th Cir.). More fundamentally, their argument throughout overlooks that "the doctrine of *res judicata* does not depend upon whether or not the prior judgment was right. It rests upon the finality of judgments as a matter of public policy, to the end that controversies once decided shall remain in repose." *Rubens* v. *Ellis*, 202 F. 2d 415, 418 (5th Cir.).[22]

[22] A word should be added here about the applicability of the *res judicata* and estoppel arguments to petitioners Robertson and Schmidt. As the Government points out (Gov. Br. 71, footnote 27), they were not parties to the prior proceedings, and Bridges alone can claim their conclusive effect. Plainly, however, Robertson and Schmidt were seriously prejudiced by the trial court's refusal to restrict the evidence to the period following the administrative proceedings, and the failure to dismiss the indictment against Bridges. Consequently, a reversal of Bridges' conviction or dismissal of his indictment will require reversal as well of Robertson's and Schmidt's convictions.

We also feel obliged to call to the Court's attention the possible bearing on this proceeding of *Western Pacific R. R. Corp.* v. *Western Pacific R. R. Co.*, 345 U. S. , decided April 6, 1953. In our petition for certiorari, filed January 14, 1953, the pendency of the *Western Pacific* case before this Court was mentioned (at p. 6, footnote 5) in connection with the supplemental petition requesting a rehearing before the Court of Appeals *en banc* (see also Pet. Br. 2, footnote 1a, Pet. Br. 11, footnote 10a). The writ of certiorari granted by this Court does not cover this question, and the following circumstances are set out solely for the Court's information.

After the original decision of the division of the court below (Tr. 8215-8296), petitioners filed a "Petition for Rehearing and Application that Petition for Rehearing be Heard En Banc" (Tr. 8297-8347), in which it was urged that since the original decision conflicted with principles enunciated by this Court (Tr. 8300; 8324-8328) and

D. Due Process.

"Due process does not require that fraud and false swearing shall go unpunished", says the Government in conclusion (Gov. Br. 91). Of course this is true, but it is not the issue here. Due process does require that an accusation of false testimony shall not be used to subject an individual to trial on a factual issue previously and repeatedly determined in his favor in other proceedings. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, extensively quoted by the Gov-

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the decisions of other courts of appeal (Tr. 8313; 8322; 8323-8324), the matter was properly one to be considered *en banc*.

After amending that portion of its opinion which dealt with the "savings clause" problem (*supra*, pp. 8-17), the court below denied the petition without ruling on the application that it be heard *en banc* (Tr. 8434). This failure to rule upon the application for a rehearing *en banc* followed the position taken some months earlier that "petitions, if any, for rehearing *en banc* in cases determined by three judges will be considered and disposed of by the latter as ordinary petitions for rehearing". *Western Pacific R. R. Corp.* v. *Western Pacific R. R. Co.*, 197 F. 2d 994, 1016 (9th Cir.).

Thereafter, petitioners filed an "Application for Leave to File Supplemental Petition for Rehearing, Prayer that Supplemental Petition for Rehearing be Heard En Banc, and that Order Denying Petition for Rehearing Be Vacated" (Tr. 8437-8454), which called attention to the fact that no order had ever been entered upon the application to be heard *en banc* (Tr. 8449-8450), and again urged that in view of the conflicts already mentioned, and other important points involved, including a possible intra-circuit conflict (Tr. 8451-8452), the case was appropriately one to be heard *en banc*.

The division, recognizing that this application was "similar" to the one involved in the *Western Pacific* case, reaffirmed "the view taken by us in the *Western Pacific* case" that "it is not a privilege of litigants to request that their cases be heard *en banc*" (Tr. 8456-8457; 201 F. 2d 254, 255). Because of the circumstance that the panel had amended its earlier opinion, it permitted the filing of the application; however, it specifically ordered it to be filed as a "petition to the Division", and it treated it "as a second petition for rehearing" and "as such", denied it (Tr. 8459-8460; 201 F. 2d 254, 256), apparently without reaching the "merits of the *en banc* issue". *Western Pacific* case, *supra*.

ernment, has no bearing on the question here, nor may it be overlooked that Bridges is presently a citizen, not an alien. Beyond this, we rest on our brief (pp. 79-87).

III

CONCLUSION

The Government's brief is pregnant with the worry that statutes of limitations and the principle of *res judicata* may allow the guilty to escape punishment, and fraud to escape detection. "If one indulges in the fantasy that those who violate laws cold-bloodedly calculate that they will be safe if they can avoid prosecution for a particular statutory term . . ." (Gov. Br. 52). "It would indeed be an odd application of the principle of *res judicata* to bar a court from protecting the integrity of its own proceedings . . . (Gov. Br. 88).

But these principles have been developed to preserve, not to frustrate, the judicial process. It is difficult enough to resolve a contested issue of fact when the evidence is fresh; after the lapse of many years it is wiser not to authorize the attempt. A later judgment on the same issue is intrinsically no more reliable, and may well be less so, than an earlier one; it is wholly possible for perjured testimony to be imposed on a court in a proceeding to set aside an earlier one as fraudulent. All this we have already and, we think, compellingly explored (Pet. Br. 42-48, 78-81, 85-90), no matter how little reaction has been stimulated in the Government's brief.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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April, 1953.